

**FAIR EMPLOYMENT & HOUSING COMMISSION**

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## MINUTES 488th COMMISSION MEETING

July 14, 2011

Hiram Johnson State Building  
455 Golden Gate Avenue  
D.I.R. Conference Room, Tenth Floor  
San Francisco, California

***PRESENT:***

Vice-Chair Patricia Perez; Commissioners Stuart Leviton, Linda Ng and Kristina Raspe; Commission staff Ann Noel, Joan Herrington, Caroline Hunt and Cynthia Jones and Commission Law Student Extern Benjamin Dockery; Deputy Attorney General Nancy Beninati; DFEH Special Projects Counsel Susan Saylor; and members of the public: Lindsey Scott-Florez, Senate Office of Research; and Madeline Neighly, National Employment Law Project.

***OPEN SESSION***

**REVIEW OF AGENDA**

Vice-Chair Patti Perez moved, Commissioner Linda Ng seconded, and the Commission voted 4:0 to open the meeting at 10:15 a.m. and to accept the Agenda. [11-19]

**REVIEW OF THE MINUTES**

Commissioner Linda Ng moved, Commissioner Stuart Leviton seconded, and the Commission voted 4:0 to adopt the Minutes and Transactions of the 487th Commission meeting. [11-20]

**BUDGET (10:16 a.m.)**

ELAS Noel told the Commission that its budget for 2010-2011 remains at the level set in Governor Jerry Brown's January 2011 proposed budget. The Commission, like other state General Fund agencies might be asked to make another 5% reduction in the next few months but that had yet to be determined.

ELAS Noel informed the Commission that Chairman George Woolverton had been asked by State and Consumer Services Agency Secretary Anna Caballero to chair a conference call meeting at 2 p.m. today to discuss future budget ideas to consolidate the functions of the

Commission under the Department of Fair Employment and Housing. The Commissioners asked that the matter be placed on the agenda for the next Commission meeting so that the Commissioners and staff would have an opportunity to discuss the issue with Chairman Woolverton.

**REGULATIONS** (10:27 a.m.)

**Pregnancy and Disability Regulations**

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and other rulemaking changes. Commissioners are working with staff on each regulatory project. The Commission directed staff and its regulation subcommittees to prepare a rulemaking package for both the pregnancy regulations and the disability regulations and present any changes to the next Commission meeting.

**Request to Amend Cal. Code Regs., tit. 2, § 7287.4(d) – Criminal Records**

Madeline Neighly, Esq., an attorney with the National Employment Law Project, spoke to the Commission about the East Bay Community Law Center's Clean Slate Practice's request that the Commission amend FEHA regulation California Code of Regulations, title 2, section 7287.4, subdivision (d)(1)(B), regarding employer's inquiries about an applicant's criminal records, to reflect changes in the law, which now allow for expungement of criminal records for felonies, misdemeanors and non-vehicular infractions. The Commission discussed with Neighly the request and whether the Commission could make the change as a streamlined "Section 100" change or whether the requested change required full rulemaking. The Commission concurred with FEHC staff's analysis that the request required full rulemaking.

Commissioner Stuart Leviton moved, Commissioner Kristina Raspe and the Commission voted 4:0 to initiate rulemaking on modifying its regulation on criminal records when the Commission completes its current rulemaking projects revising its pregnancy, disability and family leave regulations and creates new housing regulations. [11-21]

**COMMISSIONERS' REPORTS** (10:45 a.m.)

Vice Chair Patti Perez notified the Commission the article on FEHA disability law that she and ELAS Noel had co-authored was published in the Spring 2011 CEB Business Practitioner. In addition, Perez and Noel have organized a four part "Brown Bag Series" of seminars on disability issues for the Labor and Employment section of the State Bar. The next panel will be July 19 and will focus on summary judgments.

**EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT**  
**(12:50 p.m.)**

ELAS Noel directed the Commissioners' attention to her Activity Report for all items other than the Sacramento Minority Business Conference.

**SACRAMENTO BUSINESS EDUCATION SUMMIT (10:50 a.m.)**

Commissioner Linda Ng and ELAS Noel discussed with the Commission details about the Sacramento Business Education Summit. The Summit will focus on common concerns and problems faced by small businesses in complying with the FEHA. The Summit will focus on four areas: harassment, disability, leave issues and when an employer gets sued.

Both Vice Chair Perez and Commissioner Raspe expressed concern that the myriad complications of various leave requirements is daunting for human resource professionals and attorney specialists and might be much too complicated for this Summit. Commissioners and staff agreed to tailor the discussion to employers with less than 50 employees and to limit discussion to pregnancy disability leave, offering to do another workshop at a different time on leave for larger employers.

Commissioners and staff agreed to a format of plenary sessions of 30 to 45 minutes to discuss the basic law and then divide up Commissioners and staff to work with smaller breakout sessions to discuss hypotheticals and to take questions from attendees. ELAS Noel stated that she would develop a work plan to involve all Commissioners and legal staff and distribute it soon. Commissioner Ng is working to secure a location. Commissioner Raspe said that she might be able to assist as her employer might have space available in Sacramento which the Commission could use.

The Commission discussed whether it made sense either to make the conference free or to charge a nominal fee, which might assure that people who had signed up to attend actually attended. The Commission will coordinate the timing of this conference with its September 22 Commission meeting.

**LEGISLATION (11:00 a.m.)**

ELAS Noel stated that she had no news to report about legislation but would keep the Commission apprised about any important legislation affecting the Commission or the FEHA.

**DEPARTMENT'S REPORT (11:02 a.m.)**

Dfeh Chief Counsel Susan Saylor gave the report for the Department. Saylor reported that the Rutter Group has agreed to publish a Fair Housing – Public Accommodations Practice Guide authored by writers from the DFEH, FEHC and the Fair Housing and Public Accommodations Subsection of the State Bar's Real Property Section. Saylor will take principal

responsibility for the Guide and will recruit a number of subsection members, in addition to ELAS Noel to draft chapters. DFEH and FEHC are discussing a year's timeline to complete the initial guide, which will focus on California law. A later guide might also cover national law. Currently, Saylor noted, there is no comparable guide in California on fair housing and public accommodations law. To work on this project, Saylor has shifted her responsibilities in DFEH and will work under the title Special Projects Counsel beginning August 1st.

In addition to responsibility for the Guide, Susan will handle complex and Special Investigations Unit (SIU) litigation. Currently, the SIU is focusing on processing claims from the Verizon settlement, with the assistance of law students from U.C. Irvine and U.C. Davis. SIU and the law clinics are evaluating claims for treatment under three tiers: employees disciplined for taking family care leave, denied leave, and terminated for taking leave.

Saylor also reported that DFEH is conducting AB 1825 webinars available to all state employees on sexual harassment. DFEH will hold a series of webinars for the next year. In addition, DFEH's Associate Chief Counsel, Nelson Chan, is conducting a workshop on July 20 on "actionable harassment," free speech and "stray remarks." Saylor stated that the Commissioners were invited to attend this webinar.

#### **ENFORCEMENT AND COLLECTION OF FEHC DECISIONS (11:10 a.m.)**

Saylor reported that DFEH has collected a judgment against respondents in *Acosta Tacos*, as DFEH had attached a lien to real estate owned by respondents and that property was sold in a short sale, with money going to complainant Chavez in that matter.

Saylor also stated that she would look into and report back to the Commission about the status of collection in both the *Capitol Hills* and *Fulkerson* decisions.

The Commission thanked Saylor for her report.

#### **ATTORNEY GENERAL'S REPORT (11:54 a.m.)**

Deputy Attorney General Nancy Beninati reported that Governor Brown has asked Attorney General Kamala Harris to represent the state in the Ninth Circuit in a challenge to Proposition 209, an initiative which provided that the state could not give preference to any racial group, including in state university and college admissions. Governor Brown now questions whether the prohibition against considering race in college admissions is constitutional after the United States Supreme Court ruling in *Grutter v. Bollinger* (2003) 539 U.S. 306, which held that race could be considered as a "plus" factor to obtain a diverse student body in college admissions. The Governor has argued that Proposition 209 regarding college admissions could be unconstitutional because it violates the "political structure doctrine" and the equal protection clause. CRES attorneys Louis Verdugo and Antonette Cordero are working with California's Solicitor General Manuel Medeiros on this case.

Beninati also reported that the Ninth Circuit denied the DFEH's petition for rehearing en banc in *DFEH v. Lucent Technologies*. In *Lucent*, DFEH had filed a complaint against the company and the company had exercised its right to opt out to Superior Court. Once in Superior Court it removed the case to federal court. DFEH objected that it did not have diversity jurisdiction because DFEH was, for purposes of this litigation, to be considered the real party in interest and, as it was a state agency, Lucent could not litigate against it in federal court. The Ninth Circuit held (2:1) that DFEH could not be considered the "real party in interest" because it did not have a "substantial interest" in the litigation because it sought for the state affirmative relief and all financial relief went to the individual complainant. Further, as DFEH was the losing party, the court assessed \$12,000 in costs against the DFEH, notwithstanding that under the FEHA neither costs nor attorneys' fees can be assessed against the DFEH. In asking for an en banc review of this decision, DAG Beninati had argued on behalf of DFEH that the Ninth Circuit decision violated principles of federalism.

The Commission thanked DAG Beninati for her report.

**PUBLIC COMMENTS (11:30 a.m.)**

There were no further public comments.

Commissioner Leviton moved, Commissioner Ng seconded, and the Commission voted 4:0 to enter Closed Session. [11-22]. (11:31 a.m.)

The Commission took a short break.

The Commission entered Closed Session at 11:42 a.m.

**CLOSED SESSION (11:42 a.m.)**

Only the Commissioners and Commission staff were present. The Commission discussed writs, hearings and litigation and deliberated on pending cases.

a. Writs and Appeals

(1) DFEH v. Terra Linda Farms (Santillian/Rivas)

DAG Nancy Beninati reported that briefs by both parties have been submitted and the parties await a hearing date in the Court of Appeal.

b. Post-Decision

(1) DFEH v. City of Merced (Staiger)

Beninati reported that the City of Merced has filed a writ of mandate against the Commission. The Superior Court has set a hearing and briefing schedule. The hearing is set for October 3, 2011, Petitioners opening brief is due August 12, 2011, the Commission's brief is due September 9, 2011, and petitioner's reply brief is due on September 23, 2011.

(2) DFEH v. Air Canada (Zemaitis) 9:45 a.m.

Administrative Law Judge Ann Noel left the room.

Commissioner Kristina Raspe moved, Vice Chair Patti Perez seconded, and the Commission voted 4:0 to move the dissent in this decision to the end of the decision. [11-23]

Commissioner Ng moved, Commissioner Leviton seconded, and the Commission voted 4:0 to issue a Nunc Pro Tunc to eliminate the sentence on pages 17-18 of the decision from finding of fact 94 which references Dr. Slocum's opinions about the complainant's mental state. [11-24]

Commissioner Stuart Leviton moved, Kristina Raspe seconded, and the Commission voted 4:0 to deny the DFEH's Petition for Reconsideration. [11-25]

Commissioner Stuart Leviton moved, Kristina Raspe seconded, and the Commission voted 4:0 to deny the respondent's Petition for Reconsideration. [11-26]

c. Administrative Adjudication: Pending Decisions, Hearings Completed

(1) DFEH v. Acme Electric (Wideman) 12:00 p.m.

ELAS Ann Noel reentered the room.

Commission Stuart Leviton moved, and Commissioner Kristina Raspe seconded, and the Commission voted 4:0 to adopt the final decision as submitted. [11-27]

(2) DFEH v. Gareebee Enterprises (Benitez) 12:25 p.m.

Administrative Law Judge Joan Herrington left the room. Commissioner Kristina Raspe moved, Commissioner Stuart Leviton seconded, and the Commission voted 4:0 to issue a Notice of Further Argument in the case asking the parties to provide

citations in the record which support or negate each cause of action. [11-28]

(3) DFEH v. Raymond Hernandez, et al (Arnold) 12:53 p.m.

Administrative Caroline Hunt left the room.

Commissioner Kristina Raspe moved, Commissioner Stuart Leviton seconded and the Commission voted 4:0 to adopt the proposed decision but decrease the award of compensatory damages for emotional distress for each complainant from \$15,000 to \$7,500. [11-29]

**ADJOURNMENT**

Commissioner Stuart Leviton moved, Commissioner Kristina Raspe seconded, and the Commission voted 4:0 to adjourn the meeting. [11-30]

The Commission adjourned its meeting at 12:58 p.m.

Date: July 14, 2011

PATRICIA PEREZ  
Vice-Chair

ANN M. NOEL  
Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS  
OF THE 488th COMMISSION MEETING  
July 14, 2011  
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 11-19 Voted 4:0 to call the meeting to order and to approve the Agenda.
- 11-20 Voted 4:0 to adopt the Minutes and Transactions of the 487th Commission meeting.
- 11-21 Voted 4:0 to initiate rulemaking on modifying its regulation on criminal records after completing current rulemaking projects.
- 11-22 Voted 4:0 to enter Closed Session.
- 11-23 Voted 4:0 to move the dissent in DFEH v. Air Canada (Zemaitis) to the end of the decision.
- 11-24 Voted 4:0 nunc pro tunc to delete the sentence on pages 17-18 of the decision in finding of fact 94 which reads: Dr. Slonim noted that Zemaitis was depressed, both by her physical condition and the fact that her injury had cost Zemaitis her job.
- 11-25 Voted 4:0 to deny the DFEH's Petition for Reconsideration in DFEH v. Air Canada (Zemaitis).
- 11-26 Voted 4:0 to deny respondent Air Canada's Petition for Reconsideration in DFEH v. Air Canada (Zemaitis).
- 11-27 Voted 4:0 to adopt the final decision in DFEH v. Acme Electric (Wideman) as submitted.
- 11-28 Voted 4:0 to issue a Notice of Opportunity for Further Argument in DFEH v. Gareebee Enterprises, Inc., et al (Benitez) asking the parties to provide citations in the record which support or negate each cause of action.
- 11-29 Voted 4:0 to adopt the proposed decision in DFEH v. Raymond Hernandez, et al (Arnold) but reduce the amount of compensatory damages for emotional distress for each complainant from \$15,000 to \$7,500.



11-30 Voted 4:0 to adjourn the meeting.

Prepared By

Ann M. Noel  
Executive and Legal Affairs Secretary